

Animal Law Section

Summer 1998

Vol. 2. No. 2

Can Michigan Citizens Constitutionally Feed the Birds?

EDITOR'S NOTE: Last year, to its everlasting shame, the City of Eastpointe, Michigan decided to crack down on crime by citing Eastpointe resident Vicki Paske, an otherwise law-abiding citizen, for feeding pigeons and wild birds in her backyard. After Ms. Paske was convicted in the city's municipal court, Animal Law Section attorney Stuart M. Collis initiated an appeal to Macomb County Circuit Court. A happy conclusion was ultimately achieved through third-party mediation whereby Ms. Paske's conviction was vacated, and she may continue, with minor restrictions, feeding her backyard birds. For those who may be faced with similar situations in their own communities, we present relevant portions of attorney Collis' Appellate Brief wherein he made a devastating attack on the constitutionality of the city ordinance as overbroad and vague.

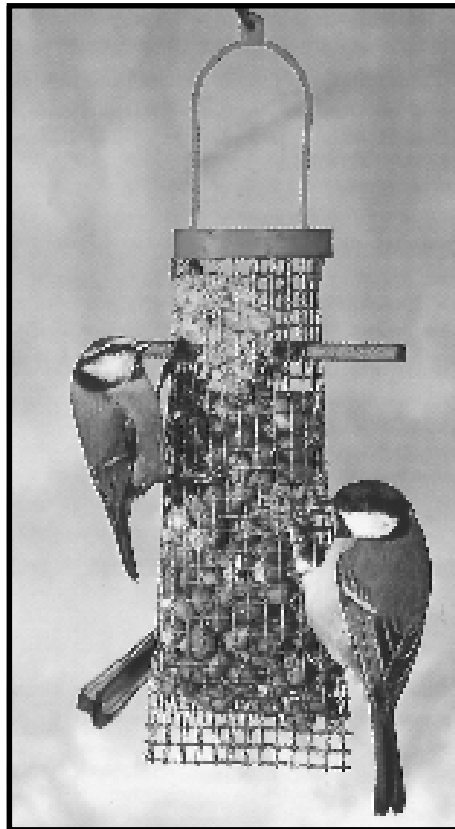
STATEMENT OF QUESTION PRESENTED

"Whether the Eastpointe City Ordinance 1860.03 is so vague or overbroad so that a reasonable person would not know what conduct was prohibited and therefore unconstitutional under the United States Constitution and Michigan Constitution."
Defendants answer, "Yes."

STATEMENT OF FACTS

On June 26, 1997, the Defendants were given a citation for an alleged violation of Eastpointe city ordinance 1860.03(C), which states, "All owners and/or occupants in the City, in order to prevent rat harborage, shall: Store and handle, in a manner approved by the City, all building materials, cartons, machinery, raw materials, fabricated goods, food and/or foodstuffs and any other materials that might provide harborage and/or a food supply for rats." The Defendants own 24766 Dwight, which is located in the City of Eastpointe. Mr. Steve Glass is the code officer for the City of Eastpointe that gave the Defendants the citation based upon a large amount of pigeons that were located at the Defendants' home.

Mr. Robert Willard also witnessed twelve pigeons on the ground, which he believed were feeding since he saw the pigeons pecking on the ground. He also witnessed several pigeon droppings, which he believed and to which three neighbors testified, were a nuisance to the neighbors. Mr. Willard believed that the birds were



feeding from food that was spilled from the bird feeder, which he estimated to be three and a half to four feet off of the ground. When asked what the relationship between pigeons and the potential for rat harborage, Mr. Willard answered that he was not an expert; however, he believed that such a situation created the potential for rat harborage because other "critters" might come in to the yard to feed. None

of the neighbors testified as to the sighting of any rats but all testified that they wished the Defendants would stop feeding the pigeons.

The Defendants had testified that they had been feeding the birds since 1992 and that they purchased the bird feeder in 1996 at the request of the city officer, Mr. Steve Glass. Mr. Glass also had asked the Defendants not to feed the birds on the ground anymore, and the Defendants complied. Furthermore, the Defendants had moved the birdhouse to the farthest possible location on their property from their complaining next-door neighbor, Jeff Kretsch.

Mr. Gary Ricci, who lives across the street from the Defendants testified that the pigeons have always been in the neighborhood and that he feeds the birds as well. Furthermore, he testified that when a bird feeds, it knocks food onto the ground. He also testified that there are several bird houses in the neighborhood.

After a bench trial, the Defendants were convicted of the ordinance violation and ordered to pay \$500 or spend 30 days in jail, beginning the following day so the Defendants could make arrangements for their children. The Defendants elected to spend the time in jail; but, they changed their mind and paid the fine the following day. Finally, nowhere on the record, during or after the trial, were the Defendants informed of their right to be represented by an attorney.

(continued on page 3)

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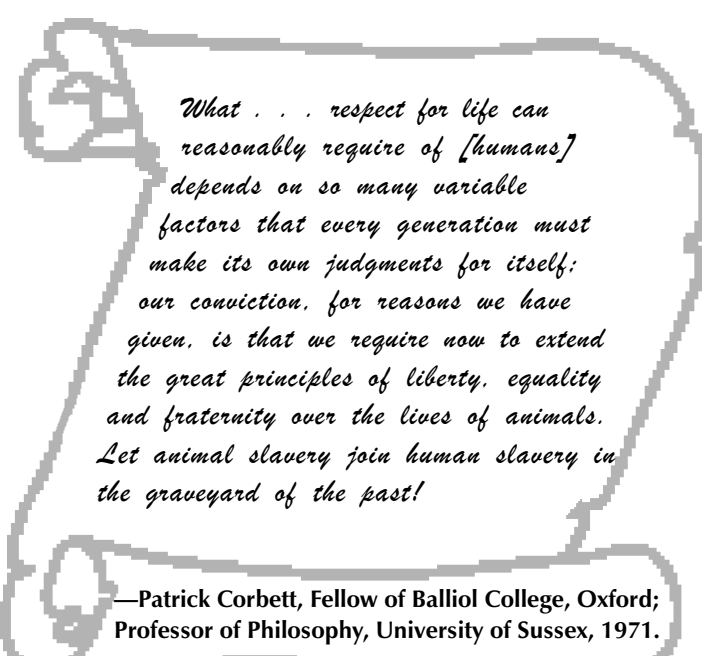
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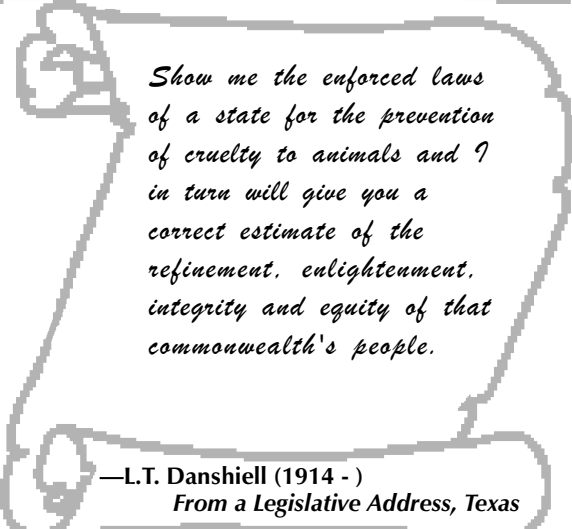
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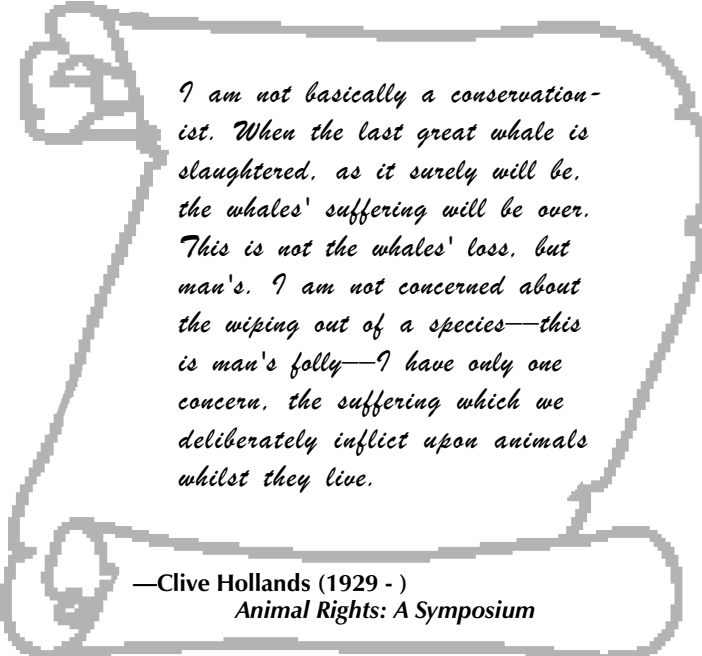
What . . . respect for life can reasonably require of [humans] depends on so many variable factors that every generation must make its own judgments for itself; our conviction, for reasons we have given, is that we require now to extend the great principles of liberty, equality and fraternity over the lives of animals. Let animal slavery join human slavery in the graveyard of the past!

—Patrick Corbett, Fellow of Balliol College, Oxford;
Professor of Philosophy, University of Sussex, 1971.



Show me the enforced laws of a state for the prevention of cruelty to animals and I in turn will give you a correct estimate of the refinement, enlightenment, integrity and equity of that commonwealth's people.

—L.T. Danshiell (1914 -)
From a Legislative Address, Texas



I am not basically a conservationist. When the last great whale is slaughtered, as it surely will be, the whales' suffering will be over. This is not the whales' loss, but man's. I am not concerned about the wiping out of a species—this is man's folly—I have only one concern, the suffering which we deliberately inflict upon animals whilst they live.

—Clive Hollands (1929 -)
Animal Rights: A Symposium

Can Michigan Citizens Constitutionally Feed the Birds? (Continued from P. 1)

LEGAL ARGUMENT

EASTPOINTE CITY ORDINANCE 1860.03 IS VAGUE AND OVERBROAD.

Courts must attempt to construe ordinances in a constitutional manner. Lansing v Hartsuff, 213 Mich App 338, 539 NW2d 781, 785 (1995). However, if ordinary persons cannot understand what conduct is prohibited and it does not encourage arbitrary and discriminatory enforcement, it is void for vagueness. Lansing v Hartsuff, 213 Mich App 338, 539 NW2d 781, 784 (1995); People v Lino, 447 Mich 567, 527 NW2d 434, 438 (1994); People v Ford, 417 Mich 66, 331 NW2d 878, 890 (1982), citing Colten v Kentucky, 407 US 104, 92 SCt 1953, 32 LEd2d 584 (1972). In Michigan, an ordinance is vague if there is failure to provide fair notice of what conduct is prohibited, arbitrary or discriminatory enforcement is encouraged, or the ordinance is overbroad and impinges on First Amendment freedoms. Lino at 438, citing People v Howell, 396 Mich 16, 20-21, 238 NW2d 148 (1976). Eastpointe City Ordinance 1860.03 should be declared void for vagueness because no ordinary person would read it to bar feeding the birds. The relevant portions of Eastpointe City Ordinance 1860.03 states that:

All owners and/or occupants in the City, in order to prevent rat harborage, shall:

(c) Store and handle, in a manner approved by the City, all building materials, boxes, cartons, machinery, raw materials, fabricated goods, foods and/or foodstuffs and any other materials that might provide harborage and/or a food supply for rats;

(f) Elevate to a height of at least forty-eight inches above ground level all containers used for the feeding of wild birds or animals. Exhibit E.

Here, no person would be able to tell if feeding the birds is prohibited or not because one portion of the ordinance states that bird feeders must be at least forty-eight inches off the ground and in another states that any thing that might provide a food supply for rats is banned. Having a bird feeder would seem useless if you were unable to put bird food in it. Furthermore, it is impossible to say, and there was no testimony at trial, whether a

rat is even attracted to bird food. Ordinary people probably believe that since they had complied with subsection f, that they were in compliance with the statute. Therefore, this ordinance is unconstitutionally vague and the Defendants' conviction must be reversed.

Even if this Court believes that the ordinance itself is clear, it may be found void for vagueness if it encourages arbitrary or discriminatory enforcement. The ordinance states that one can store or handle "in a manner approved by the City" essentially anything that might provide harborage for a rat. Nowhere in the ordinance are there standards for the city to approve or disapprove of such structures. This gives whatever city official is in charge on a given day the pure ability to decide whether he believes that a structure is in compliance with the ordinance. Without standards, there is nothing but discretion available and therefore its enforcement, without such standards, is also discretionary. Therefore, the Defendants' conviction must be reversed.

Eastpointe's City Ordinance 1860.03 also fails under the overbreadth doctrine. Michigan's overbreadth doctrine is subsumed within its vagueness doctrine, as overbreadth is the third way that an ordinance may be found unconstitutional. People v Lino, 447 Mich 567, 527 NW2d 434, 438 (1994). Under the First Amendment, attacks for overbreadth should not be defeated based on the raising of some other person's potential rights. Village of Schaumburg v Citizens for a Better Environment, 444 US 620, 100 Sct 826, 835, 63 LEd2d 73 (1980); Broadrick v Oklahoma, 413 US 601, 93 SCt 2908, 37 LEd2d 830 (1973).

Eastpointe's ordinance could potentially violate many persons that would ordinarily fit within constitutionally protected speech areas. For example, Eastpointe's ordinance would cause shanties, similar to those that used to be in Ann Arbor in protest of homelessness to be illegal if the city did not approve the structure, which again, there are no standards for approval or disapproval. The ordinance could also violate persons who owned motor vehicles because any machinery not stored or handled, as approved by the city is illegal. See Exhibit E. Flag burning, which is constitutionally protected as a form of speech, could also be banned by Ordinance 1860.03 because a flag could be construed as a fabricated good, which if not handled to the city's specifications, whatever they might be, would be illegal. Therefore, this ordinance is overbroad and the Defendants' conviction must be reversed.

<p><u>FEDERATION DAY</u> "Putting It All Together" Saturday September 26 Call Scott Harris 517.676.2100</p>	<p><u>HEALPAC LOBBY DAY</u> "Speaking for The Voiceless" Wednesday September 30 Call Eileen Liska 248.887.2184</p>	<p><u>Clean Communications</u> "Graphic Design & Production of The Animal Law Section Newsletter" Call John Simecek 313.534.4231</p>	<p><u>THE MICHIGAN INITIATIVE</u> "Help Prevent the Next Seal-Slaughter" Call Adam Wright 517.374.2703</p>	<p><u>ANIMAL ATTORNEY REFERRAL FORUM</u> "Making the Difference" Call Don Perkins 810.465.6000</p>
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CAPITOL REPORT

By Jeanee Frazee, Esq. with assistance from Eileen Liska

House Bills 4791, 4892, and 4793 ban the private ownership, breeding, and sale of exotic non-native cats, bears, and primates: native wild cats and bears: and wolf-dog crosses, respectively. People who now own [sic] such animals could keep them until they die as long as they safely and humanely house and care for them.

As this newsletter went to press, these important bills were stalled in the Senate Committee on Hunting, Fishing, and Forestry, chaired by State Senator David Jaye (R-Macomb County). Opponents of these bills, especially wolf-hybrid breeders, have misled some legislators into thinking that these animals are just another breed of dog (which they are not) and that they pose no greater threat than any other "dog breed." The bill's sponsors, assisted by The Michigan Humane Society, are continuing their efforts to persuade Senator Jaye to transfer these bills out of his committee and into one germane to the issues they address: the Senate Committee on Urban, Local, and State Affairs, chaired by Senator Leon Stille.

At press time, House Bill 5057, designed to make further improvements in Michigan's misdemeanor anti-cruelty law, was poised to pass the State House of Representatives. Sponsored by Rep. Jon



Wolf-dog Hybrid pup. Photo by Norvia Behling as it appeared in the July/August 1995 issue of *Animals Magazine* with whose permission this photo is reprinted for the ALS Newsletter.

Jellema (R-Ottawa County), it streamlines the court process by which animal victims of cruelty are forfeited by their owners [sic]. The Michigan Humane Society, with the help of State Rep. David Gubow (D-Huntington Woods), added some crucial amendments to the bill that clarify what constitutes "adequate shelter" for dogs. The amendments also outlaw the constant and unsafe tethering of dogs. Since the problems of dogs not being properly housed or being neglected on the end of a chain are two of the most frequent types of neglect, these amendments are critical and long overdue. Passing this bill would allow humane investigators to improve the daily lives of thousands of dogs in our state.

Editor's Note: Jeanee Frazee is a Southfield attorney serving as Chairperson of the Animal Law Section's Legislation Committee. She was assisted in this report by Eileen Liska, Michigan Humane Society's legislative lobbyist in Lansing. Ms. Liska was awarded the 1996 Legislative Achievement Award from the Humane Society of the United States, making her the only person in the United States to have received the award for two consecutive years.

"That which is not just is not law."

Words of 19th-Century Abolitionist William Lloyd Garrison

Printed in an 1858 edition of "The Liberator" (Boston, Massachusetts)

THE ANIMAL LAW SECTION OF THE STATE BAR OF MICHIGAN NOMINATIONS OF NEW OFFICERS

The Nominating committee of the Animal Law Section of the State Bar of Michigan, chaired by attorney Thomas M. Boven, nominates and proposes the election of new officers as follows:

- Chairperson: Barbara H. Goldman Southfield
- Chairperson-elect: Catherine L. Wolfe Frankfort
- Secretary: Donald N. Perkins Mount Clemens
- Treasurer: Charles E. Liken Lansing

The Nominating Committee also places the following names in nomination for Council membership for a term commencing with the Annual Meeting in 1998 and expiring as of the Annual Meeting in 2001:

- Donald R. Garlit Canton
- Ginny K. Mikita Grand Rapids
- Sharon N. Smith Bingham Farms
- Lisa Ward Lansing

VOTING BY SECTION MEMBERS FOR THESE POSITIONS WILL TAKE PLACE AT 3:00 P.M. ON FRIDAY, SEPTEMBER 18, 1998 AT THE ANIMAL LAW SECTION'S BUSINESS MEETING FOLLOWING THE 2:00 PRESENTATION BY HON. KAYE TERTZAG.

LEGISLATIVE PERSPECTIVE

By Wanda A. Nash, Esq.

This summer, the Michigan Legislature is out campaigning in this first election after the imposition of term limits; by the end of September 1998, legislators will have returned from the primary election hiatus and will be gearing up for the general election in November. Animal legislation will either be passed in a flurry, or will die with the legislative Session in December.

These are the bills to watch and, if the Legislature actually takes them up, ACT ON:

1. **HB 5843** allows counties to OPT FOR dog licenses to expire in the month of the dog's rabies vaccination and to OPT FOR a 3-year license. This would amend the Dog Law and is a measure for which I encourage support.

2. **HB 5057** amends the penal code: (1) "animal shelter" becomes "animal protection shelter" and "dog pound" becomes "animal control shelter"; (2) "adequate care" would add exercise; (3) "shelter" adds language specific to "food" animals and dogs for better enforcement; (4) adds definition for "tethering" of dogs; and (5) provides that forfeiture proceedings are civil in nature rather than criminal, AND puts a "hold" on other civil actions (so, for instance, defendant couldn't sue to regain the animal while the forfeiture action is pending). I recommend a position favoring these amendments.

3. **HJR V** and **HB 4787** ARE VERY DANGEROUS. House Joint Resolution V would amend the state constitution to provide a constitutional RIGHT to "harvest," hunt, fish, and gather from renewable resources. that would set the stage for enacting the statute (**HB 4787**) that would place regulation in the natural resources and environmental protection act. Many of us may think this already exists—but so far, the state's laws have been enough to make us think so; if the *constitution* is amended—and, clearly, we should oppose this—the pro-animal, pro-environment, anti-exploitation citizens will have lost all rights to this little island of creation. On the other hand, the bill was referred in May **1997** to the House Committee on Conservation, Environment, and Recreation. If this Legislature is going to act now, in this very small window between the primary and general elections, they will have to act fast. If THEY do that, BE PREPARED TO FIGHT BACK!

4. **HB 5366** would provide a bounty on persons who are defined as "harassers" of hunters, fishers, and commercial fishers—a bounty similar to the one for litterers. One of the problems, of course, is found in reactionary irony, namely, in the harassment of anyone who speaks out for animals: chances are, if you're anonymously "turned in," you are, in essence, found guilty prior to any judicial/administrative procedures. This has passed the House as (**H-2**) and is in the Senate. Because it's anti-animal, it's possible that the Senate will act on it and the Legislature could pass it. I recommend active opposition immediately.

5. **HB 4791/4792/4793** are tie-barred and all have passed the House and, as of 6-30-98, are in the Senate Committee on Farming, Agribusiness, and Food Systems. **4791 (H-2)** regulates the keeping of certain dangerous exotic animals; **4792 (H-2)** while regulating current "keepers" of big cats and bears, prohibits the keeping of such animals other than by a zoo or a rehabber or a university doing "research" on them; **4793 (H-1)** regulates the "keeping" of wolf-dog hybrids. These bills take this dimension of animal law in the right direction and should be supported, though further amendments to them should be conscientiously considered.

6. **HB 5003** would require school districts to provide gun safety courses upon request. This issue was referred to the Committee on Education in July 1997, so action now isn't too likely, WHICH IS the single best reason to oppose it now and watch for its future return in any form.

7. **SB 963** would reduce the age requirement for firearm deer hunting TO THE AGE OF 12. The Committee on Hunting reported it favorably, with substitute (**S-1**); on 4-3-98, it was referred to the Committee on Hunting/Fishing/Forestry. ASK YOUR SENATOR ABOUT THIS ONE—s/he should know that you oppose it in case it comes to the full Senate.

8. **SB 493** allows "registered dog clubs" to live-trap and release rabbits during the training of dogs. This has passed the Senate as (**S-1**) and was, on 4-30-98, referred to the House Committee on Conservation, Environment, and Recreation. This is likely to pass unless there's sustained, cogent, and well-deserved opposition to it.

9. **HB 4868** would require special training of animal control officers under the Michigan Law Enforcement Training Council. The bill, on 6-4-97, was referred to the Committee on Local Government. This isn't likely to go anywhere this Session, but positive comments during this Session might help to resurrect this worthy bill in the next Session.

Legislation at the federal and state levels lay the foundation for local ordinances. If you have any interest in legislation, please contact me. We need people who like to read bills, or contact legislators, or write letters/postcards, or work on drafting language, or compare legislation from one legislative session to another, or any of the other tasks involved in monitoring legislation that has an impact on animals.

Contact Wanda Nash at 616-789-1340.

Editor's Note: *Marshall, Michigan attorney Wanda A. Nash was the first chairperson of the Animal Law Section.*

*Mark
Your Calendar!*

**ANIMAL LAW SECTION
Annual Meeting
Program
September 18, 1998**

Section Chairperson:
Beatrice M. Friedlander

Program Co-chairpersons:
Ginny K. Mikita and Lisa Ward

title: "Valuing Your Companion Animal's
Life: A Judicial Perspective"

Speaker: Hon. Kaye Tertzag – Wayne County
Circuit Court

Business Meeting and Election

STATE BAR OF MICHIGAN
ANNUAL
MEETING
SEPTEMBER 16-18, 1998 • LANSING, MI

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Animal Law Section

The Animal Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, this site, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan. For information about joining the Animal Law Section, click on "Membership".

Member List - *coming soon!*

- [Bylaws](#)

Newsletters

- [Summer 1997](#) (221K .pdf File)
- [Winter 1997-98](#) (714K .pdf File)

Publications

- [1998 Annual Report](#)
- [Petition for the Establishment of the Animal Law Section of the State Bar of Michigan](#)



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GRANT MONEY AVAILABLE

Attorneys for Animals (AfA-a 503(c) organization) has a one-time grant available of up to \$1,000 to any attorney pursuing an animal-protection case in Michigan. The grant may not be used for attorney fees, but may be used to defray costs such as filing fees, depositions, transcripts, records-requests, motion fees, etc. Interested attorneys should contact Beatrice Friedlander at (313)483-4612.

**Letters and articles for future newsletters from members of the
Animal Law Section are welcome.**

Please make submissions to the editor.

**ATTN: Donald N. Perkins, 2 Crocker Blvd., Suite #301,
Mt. Clemens, MI 48043. Telephone: (810) 465-6000**